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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1995

GARY NEWSOM
and
JEROME WOLF,
Petitioners,

vs.

THE STATE OF TEXAS,
Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE COURT OF APPEALS OF TEXAS
THIRD SUPREME JUDICIAL DISTRICT
AT AUSTIN, TEXAS

Counsel for Petitioners:

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December 11, 1995

10 pp

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QUESTIONS PRESENTED

1. Whether the Ex Post Facto clause of the Constitution prohibits the action of the Texas Court of Appeals in crafting two new important questions of state law to the adverse affect of Petitioners in order to affirm Petitioners' convictions.

2. Whether Due Process of Law considerations prohibit the action of the Texas Court of Appeals in crafting two new important questions of state law to the adverse affect of Petitioners in order to affirm Petitioners' convictions.

3. Whether the Court of Appeals' decision, which crafted two new important questions of state law to the adverse effect of Petitioners, violates the Petitioners' Sixth Amendment right to the effective Assistance of Counsel for their defense.

LIST OF PARTIES

The undersigned attorney of record for Petitioner certifies that the following listed persons have an interest in the outcome of this case.

Petitioners:

Gary Newsom
Jerome Wolf

Respondent:

The State of Texas

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ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE COURT OF APPEALS OF TEXAS
THIRD SUPREME JUDICIAL DISTRICT
AT AUSTIN, TEXAS

Petitioners, GARY NEWSOM and JEROME WOLF, respectfully request that a writ of *certiorari* be issued to review the Judgment of the Court of Appeals for the Third Supreme Judicial District at Austin, Texas, which affirmed the judgments of conviction of the Petitioners in the 167th District Court of Travis County, Texas.

OPINIONS BELOW

The Court of Appeals affirmed Petitioners' convictions and sentences on May 17, 1995 (Appendix A-1; A-2). The unpublished opinion of the Court of Appeals appears in the Appendix at A-3--33. Petitioners did not file a motion for rehearing. Petitioners and the Respondent State of Texas timely filed Petitions for Discretionary Review to the Court of Criminal Appeals of Texas. All petitions were refused without comment by the Court of Criminal Appeals on September 13, 1995.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Sec.tion 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S. CONST., art. I, Sec. 9, cl. 3:

> No Bill of Attainder or ex post facto Law shall be passed.

U.S. CONST., AMENDMENT V:

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

U.S. CONST., AMENDMENT VI:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. CONST., AMENDMENT XIV:

. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEX. PENAL CODE ANN. Sec. 71.02 (West 1994):

(a) A person commits an offense if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination or as a member of a criminal street gang, he commits or conspires to commit one or more of the following:

(1) murder, capital murder, arson, aggravated robbery, robbery, burglary, theft, aggravated kidnapping, kidnapping, aggravated assault, aggravated sexual assault, sexual assault, or forgery;

. . . .

(b) Except as provided in Subsection © of this section, an offense under this section is one category higher than the most serious offense listed in Subdivisions (1) through (9) of Subsection (a) of this section that was committed, and if the most serious offense is a Class A misdemeanor, the offense is a felony of the third

degree, except that if the most serious offense is a felony of the first degree, the offense is a felony of the first degree.

(c) Conspiring to commit an offense under this section is of the same degree as the most serious offense listed in Subdivisions (1) through (9) of Subsection (a) of this section that the person conspired to commit.

TEX. PENAL CODE ANN. Sec. 31.03. Theft (West 1994):

(a) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property.

(b) Appropriation of property is unlawful if:

(1) it is without the owner's effective consent;

. . . .

(e) Except as provided by Subsection (f) of this section, an offense under this section is:

(5) a felony of the second degree if:

. . . .

(B) the value of the property stolen is $20,000 or more but less than $100,000; or

Tex. Code Crim. Proc. Ann. art. 28.10 (West 1989):

(a) After notice to the defendant, a matter of form or substance in an indictment or information may be amended at any time before the date the trial on the merits commences. On the request of the defendant, the court shall allow the defendant not less than 10 days, or a shorter period if requested by the defendant, to respond to the amended indictment or information.

(b) A matter of form or substance in an indictment or information may also be amended after the trial on the merits commences if the defendant does not object.

(c) An indictment or information may not be amended over the defendant's objection as to form or substance if the amended indictment or information charges the defendant with an additional or different offense or if the substantial rights of the defendant are prejudiced.

Rule 90, TEX.R.APP.P.:

(c) **Determination to Publish**. A majority of the justices participating in the decision of a case shall determine, prior to the time it is issued, whether an opinion meets the criteria for publishing, and if it does not meet the criteria for publication, the opinion shall be distributed only to the persons specified in Rule 91, but a copy may be furnished to any interested person. On each opinion a notation shall be made to "publish" or "do not publish." Any party may move the appellate court to reconsider the determination whether to publish an opinion. The justices participating in the decision of a case may reconsider their determination whether to publish an opinion after it has issued. However, the appellate court shall not order any unpublished opinion to be published after the Supreme Court or Court of Criminal Appeals has acted on any party's application for writ of error, discretionary review, or any other relief. The Supreme Court or the Court of Criminal Appeals may on request of any party or non-party to a court of appeals decision order a court of appeals opinion published at any time.

(d) **Standards for Publication**. An opinion by a court of appeals shall be published only if, in the judgment of

a majority of the justices participating in the decision, it is one that (1) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority.

STATEMENT OF THE CASE

Both Petitioners were charged by indictment with the offense of engaging in organized criminal activity[1] with the predicate offense for the alleged organized activity being theft over $20,000[2] in cause number 93-2962, filed February 8, 1991. R.I- 4-9. Petitioners were convicted under the first count in the indictment which alleged in pertinent part that Petitioners:

> [W]ith intent to establish and maintain and participate in a combination and in the profits of a combination consisting of [appellants], Pat Fry, [and] David Williams, did commit the following offenses pursuant to a continuing course of conduct:
>
> On or about the 8th day of March, 1990, in the County of Travis and State of Texas, Pat Fry and David Williams and defendants Gary Newsome and Jerome

---

[1] Tex. Penal Code Ann. Sec. 71.02 (West 1994)

[2] Tex. Penal Code Ann. Sec. 31.03(e)(5) (West 1994);

> Wolf did then and there unlawfully appropriate property, by acquiring and otherwise exercising control over property, namely, workers' compensation insurance, of the value of over $20,000.00 and with the intent to deprive the owner of the property and without the effective consent of the owner, the Texas Workers Compensation Assigned Risk Pool, said consent being **induced** by deception, namely, said defendants created and confirmed by words and conduct, a false impression of fact, not believing it to be true, that was likely to affect and did affect the judgment of said owner in the transaction.

In the initial indictment, the State alleged in pertinent part that the Petitioners acted with the intent to deprive the owners of the property and without the effective consent of the owners. Specifically, the State alleged that the owners were "Houston General Insurance Company and the Texas Workers Compensation Assigned Risk Pool", and further, the indictment alleged that the said consent was "**inducted** by deception". R.I- 4.

On July 6, 1993, and again on July 28, 1993, the State sought to amend the indictment, first by altering the word "inducted" to "induced", and secondly by striking all

reference to "Houston General Insurance Company and" in the same paragraph of the indictment. R.I- 90, 93.

Both motions were granted by the trial judge, with the first motion granted on July 6, 1993, and the second granted on July 28, 1993. R.I- 90, 95.

The instant trial began on August 16, 1993. R.I- 3; R. "Pretrial Hearing and Voir Dire", 4. During the pre-trial hearing which was held on the first day of the trial, the State sought to actually make the amendments to the indictment which the trial judge had previously authorized. R. "Pretrial Hearing and Voir Dire", 19-32. The Petitioners objected to the day-of-trial amendment, however, these objections were overruled. R. "Pretrial Hearing and Voir Dire", 20-32. The indictment was thereafter physically altered on its face with the notations authorized in the Court's orders of July 6, 1993, and July 28, 1993. R. "Pretrial Hearing and Voir Dire", 20-32. Thereafter, the Petitioners again objected to the reading of the amended indictment to the jury. R. II- 48-49.

On appeal to the Court of Appeals of Texas, the Petitioners raised three points of error regarding the amendment of the indictment. The Court of Appeals concluded that the indictment was improperly amended, but then engaged in what purported to be a harm analysis and, thereafter, concluded that the error was harmless and affirmed Petitioners' convictions (Appendix at A-20-24).

Petitioners requested the Court of Criminal Appeals of Texas to review the issues on discretionary review contending that:

1. The Austin Court of Appeals erred in finding that an amendment of an indictment on the day of trial in violation of Tex. Code Crim. Proc. Ann. Art. 28.10(C) was subject to harm analysis.

2. The Austin Court of Appeals erred in failing to properly apply the applicable case law relating to harm analysis.

3. The opinion of the Austin Court of Appeals is in conflict with the trial record.

4. The Austin Court of Appeals, having crafted two new rules of law, erred in applying them retroactively to the Petitioners.

The petitions for discretionary review were denied by the Court of Criminal Appeals on September 13, 1995.

ARGUMENT AND REASONS FOR ALLOWANCE OF THE WRIT

There are special and important reasons for granting the writ of certiorari in this case. A convicted citizen's federal constitutional rights attendant to an appeal granted by a State as a matter of right have been guardedly addressed by this Court. This case presents ex post facto considerations in addressing whether a State appellate court may craft new rules of law applicable only to the individual litigants before it and avoid precedential and Equal Protection implications by not publishing its decision contrary to its rules of appellate procedure. This case presents the issue of what notice is due

to citizens of a State who may rely on long-established, published appellate court decisions in their trial strategy only to find that the State appellate system will not follow such decisions in any given particular case and in doing so not advise the bench, bar and the citizens of a newly crafted law or its exception, or, in the terms of the Texas system to advise whether a case:

> establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority.

Petitioners' lawyers, practicing before a system which relies largely upon published opinions of intermediate courts of appeals and the court of last resort in a State, became court-constrained ineffective in this case when the Court of Appeals established a new rule of law, and altered and modified an existing rule, while applying an existing rule to a novel fact situation, to the Petitioners' detriment.

Petitioners' Questions should be reviewed by this Court because the procedural history of this case presents an

important question of federal law which has not been, but should be, addressed and settled by this Court. Rule 10(1)(c), Supreme Court Rules.

ARGUMENT UNDER QUESTIONS 1 & 2

1. Whether the Ex Post Facto clause of the Constitution prohibits the action of the Texas Court of Appeals in crafting two new important questions of state law to the adverse affect of Petitioners in order to affirm Petitioners' convictions.

2. Whether Due Process of Law considerations prohibit the action of the Texas Court of Appeals in crafting two new important questions of state law to the adverse affect of Petitioners in order to affirm Petitioners' convictions.

Since the Texas Court of Criminal Appeals first announced the rule in *Sodipo v. State,* 815 S.W.2d 551 (Tex. Crim. App. 1990) it has been the clear, unambiguous and dispositive law in Texas that day of trial amendments are not authorized in Texas law and that where such amendments are made, that error is not subject to a harm analysis. *See*: *Bigby v. State,* 892 S.W.2d 864 (Tex. Crim. App. 1994); *Miller v. State*, 866 S.W.2d 243 (Tex. Crim. App. 1993); *Townsend v. State,* 865 S.W.2d 469 (Tex. Crim. App. 1993); *Warmowski*

v. State, 853 S.W.2d 575 (Tex. Crim. App. 1993); *Martin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993); *Rent v. State*, 838 S.W.2d 548 (Tex. Crim. App. 1990); *Brown v. State*, 828 S.W.2d 762 (Tex. Crim. App. 1991); *Hillin v. State*, 808 S.W.2d 486 (Tex. Crim. App. 1991); *Sodipo v. State*, 815 S.W.2d 551 (Tex. Crim. App. 1990). In fact, every intermediate appellate court in Texas for the last five years who has discussed this issue, including the Austin Court of Appeals, has recognized this plain rule. *See*: *McCoy v. State*, 889 S.W.2d 354 (Tex. App. - Hou.[14th Dist.] 1994); *Hilton v. State*, 879 S.W.2d 74 (Tex. App. - Hou.[14th Dist.] 1994); *Hinojosa v. State*, 875 S.W.2d 339 (Tex. App. - Corpus Christi, 1994); *Wright v. State*, 873 S.W.2d 77 (Tex. App. - Dallas, 1994); *Duncan v. State*, 850 S.W.2d 813 (Tex. App. - Hou.[14th Dist.] 1993); *Kennerson v. State*, 848 S.W.2d 883 (Tex. App. - Hou.[14th Dist.] 1993); *Williams v. State*, 837 S.W.2d 819 (Tex. App. - Hou. [14th Dist.] 1992); *Boutte v. State*, 824 S.W.2d 322 (Tex. App. - Hou.[1st Dist.] 1992); *Jones v. State*, 821 S.W.2d 234 (Tex. App. - Hou.[14th

Dist.] 1991); *Warmowski v. State*, 818 S.W.2d 505 (Tex. App. - San Antonio, 1991). *See also: Hood v. State*, 828 S.W.2d 87, 95 (Tex. App. - Austin 1992) wherein the Austin Court recognized that these errors are not subject to harm analysis. The opinion affirming Petitioners' convictions in this case is in conflict with every published Texas Appellate decision in the last five years which has considered this issue, including cases out of the Court of Appeals at Austin, Texas.

Petitioners contend that this modification of well-established Texas law upon which Petitioners relied to their detriment, constitutes an impermissible Ex Post Facto application of law. The Ex Post Facto Clause of the United States Constitution, art. I, Sec. 9, cl. 3, prohibits the enactment of:

> [A]ny law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." ... Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of the effect and permit individuals to rely on their meaning until explicitly changed.

Weaver v. Graham, 450 U.S. 24, 28-29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981)(quoting *Cummings v. Missouri*, 4 Wall. 277, 325- 326, 18 L.Ed. 356 (1867).

For a law to be *ex post facto*, "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver*, 450 U.S. at 29, 101 S.Ct. at 964. *See also*, *Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987); *United States v. Suarez*, 911 F.2d 1016 (5th Cir. 1990). In *Suarez*, the Fifth Circuit quoted *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798) in summarizing those laws which the words and the intent of the *Ex Post Facto* Clause prohibited:

> Every law that aggravates a crime, or makes it greater than it was, when committed [or] ... that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed [or] ... that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender. [citations omitted]."

United States v. Suarez, 911 F.2d at 1021. The Fifth Circuit also said in *Suarez*, a sentencing guidelines case, that:

> "[F]inding an *ex post facto* law in this case furthers one of the purposes behind the constitutional prohibition on such laws: 'to prevent prosecution and punishment without fair warning. [Citations omitted] Although the sentencing statute states that the guidelines to apply are those 'in effect on the date the defendant is sentenced,' 18 U.S.C. Sec. 3553(a)(4) & (5), such constructive notice that the guidelines may change cannot override the constitutional prohibition against *ex post facto* laws. *See, Miller*, 482 U.S. at 431, 107 S.Ct. at 2451 ('The constitutional prohibition against *ex post facto* laws cannot be avoided merely by adding to a law notice that it might be changed.'); *Rubino*, 845 F.2d at 1280 (King, J., concurring). **Suarez is entitled to assume that the guidelines in effect when she committed her crime would apply when she was sentenced.**" [emphasis added].

Id. at 1022.

Although the *Ex Post Facto* Clause expressly restricts Congress, "[t]he principle embodied in the clause is ... encompassed in the concept due process and is therefore a limitation on the power of the other two branches of government as well." *United States v. Brown*, 555 F.2d 407, 419 (5th Cir. 1977), *cert. den.*, 435 U.S. 904, 98 S.Ct. 1448, 55 L.Ed.2d 494 (1978), quoting *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977):

> The Ex Post Facto Clause is a limitation upon the powers of the legislature, see *Calder v. Bull*, 3 Dall. 385, 1 L.Ed. 648 (1798), and does not of its own force

> apply to the Judicial Branch of government. *Frank v. Magnum*, 237 U.S. 309, 344, 35 S.Ct. 582, 593, 59 L.Ed. 969 (1915). But the principle on which the clause is based - the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties - is fundamental to our concept of constitutional liberty. [citations omitted]. As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment.

In *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), a case involving the cognate provision of the Fourteenth Amendment, this Court reversed trespass convictions, finding that they rested on an unexpected construction of the state trespass statute by the State Supreme Court:

> "[A]n unforseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law such as Art. I, Sec. 10, of the Constitution forbids. . . . If a state legislature is barred by the *Ex Post Facto* clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." [citation omitted].

430 U.S. at 192, 97 S.Ct. at 992-993, 51 L.Ed.2d at 260. Thus, a statute which does not violate the *ex post facto* clause on its face nonetheless may be enforced or judicially construed in a manner violative of the *ex post facto* clause

and the Fifth Amendment Due Process clause, which the Appellant contend occurred here, as applied to these Appellant. Thus, in *Bouie,* this Court said:

> "The basic due process concept involved is the same as that which the Court has often applied in holding that an unforseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question. [citations omitted]. The standards of state decisional consistency applicable in judging the adequacy of a state ground are also applicable, we think, in determining whether a state court's construction of a criminal statute was so unforseeable as to deprive the defendant of the fair warning to which the Constitution entitles him. In both situations, 'a federal right turns upon the status of the state law as of a given moment in the past -- or, more exactly, the appearance to the individual of the status of state law as of that moment....' [citation omitted]. When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right. [citation omitted]'"

The decision of the Texas Court of Appeals, in an unpublished opinion which cannot be cited as authority,[3] alters five years of established Texas case law,

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[3] Rule 90(I), TEX.R.APP.P.

retroactively only to these Petitioners, by making day of trial amendments to indictments subject to a harm analysis, and then applies the new rules to the Petitioners to their detriment.

On appeal, the Petitioners raised three points of error regarding the amendment of the indictment. The Austin Court of Appeals concluded that the indictment was improperly amended, but then engaged in what purported to be a harm analysis and, thereafter, concluded that the error was harmless. Further, the Austin Court concluded that since the trial court offered the Petitioners the opportunity for a ten day continuance after the illegal amendment, an offer the Petitioners declined, the trial court "could have reasonably inferred that Petitioners were not surprised or unprepared to respond to the amended indictment." First, whether a trial court could reasonably infer a law lack of surprise is not the standard for harm analysis required under Texas law by Tex. R. App. Pro. 82(B) as authoritatively construed by the Texas Court of Criminal Appeals in *Harris v. State*, 790 S.W.2d

568, 587-88 (Tex. Crim. App.1989) and *Arnold v. State*, 786 S.W.2d 295, 298 (Tex. Crim. App. 1990).

Texas law contains a clear and unambiguous statement to the effect of harm in any case and precisely how that harm is to be addressed on appeal. Specifically, Tex. R. App. Pro. 81(b)(2) provides that where a case is found to contain an error, the reviewing court must reverse the conviction unless it can determine "beyond a reasonable doubt that the error made no contribution to the conviction or punishment." In addressing the meaning of this rule, the Texas Court of Criminal Appeals has held that were error is detected, there is a "coherent standard for determining when an error is harmless." *Harris v. State,* 790 S.W.2d 568, 588 (Tex. Crim. App. 1989). The Court held that there is an appellate presumption of harm and that the reviewing court can affirm only when it finds, beyond a reasonable doubt, that the error in no way contributed to either the conviction or the sentence. Id. at 588. The Court has, however, established an exception to this rule and its application: where there is a

violation of a mandatory statute, harm is presumed. *Sodipo v. State, supra. See also: Brown v. State,* 828 S.W.2d 762 (Tex. Crim. App. 1991); *Hillin v. State,* 808 S.W.2d 486 (Tex. Crim. App. 1991); *Roberts v. State,* 784 S.W.2d 430, 435 (Tex. Crim. App. 1990) and cases cited therein.

As with the violation of other mandatory statutes, the instant amendment resulted in the reviewing court not having a record on the trial on the unamended indictment. The reviewing court, thus, has no way of intelligently determining what, if any, effect the amendment would have had on the jury's deliberations; the court lacks "concrete data from which an appellate court can meaningfully gauge or quantify the effect of the error".

In the instant case the Court of Appeals focused solely on what the trial court might have inferred for from a refusal to agree to an illegal continuance. Essentially, the Austin Court of Appeals is holding that a trial court can permit an unlawful act, then insulate itself from appellate review by engaging in another a second unlawful act. If the

accused has the temerity to stand up for his rights, the court of appeals will turn a blind eye to the trial court's illegal actions and will determine that as long as the trial court could engage in an inference of lack of surprise, then there is no harm shown.

Surprise is simply not the issue. There are mandatory statutes. Article 28.10 is one. While Tex. R. App. Pro. 81(b)(2) addresses the injury to the Appellant in the instance were error is committed at trial, there is another injury that must also be considered: the injury to the Legislature's power to dictate procedures to be employed in criminal cases. Legislature has the right and power to order some things done in all criminal cases. Such is the case with article 28.10. It is the Legislature's rights that are injured if their determination to prohibit amendments such as this is not scrupulously honored. Regardless of the effect of the error on the Appellant, it is incumbent upon the courts to uphold the Legislature's clear intent that these kinds of amendments not be permitted. It was for these reasons that the Court of

Criminal Appeals has held that violations of art. 28.10 are not subject to a harm analysis and any violation of that statute is reversible error per se.

Nor should an accused be put to a choice of rights. The Petitioners in this case had the right to prohibit the State from making a day of trial amendment to the indictment and they had a right to proceed to trial on that date without accepting an unwanted continuance. The record adequately reflects the Petitioners' reasoning for both why they did not want a continuance and why they would be harmed if the amendments were permitted. It is not up to an intermediate appellate court, when confronted with clear violations of statutes, to suggest that as long as the trial court can infer some alternative reasoning then the accused isn't harmed.

Under Texas law existing at the time of Petitioners' trial, amendments to the indictment made on the day of trial, even "if prior to the commencement of jury selection, constitutes reversible error". *Sodipo v. State*, 815 S.W.2d 551 (Tex. Crim. App. 1991) (opinion on rehearing); *Brown v.*

State, 828 S.W.2d 762 (Tex. Crim. App. 1991). Petitioners contend that applying due process considerations, the Ex Post Facto clause of the Constitution prohibits the action of the Texas Court of Appeals in crafting two new important questions of state law to the adverse affect of Petitioners in order to affirm Petitioners' convictions.

ARGUMENT UNDER QUESTION 3

3. Whether the Court of Appeals' decision, which crafted two new important questions of state law to the adverse effect of Petitioners, violates the Petitioners' Sixth Amendment right to the effective Assistance of Counsel for their defense.

At the time the State sought to amend the indictment, and during the course of Petitioners' objections to the physical interlineation of the indictment, Petitioners' trial counsel articulated the harm in allowing the indictment to be physically altered on the day of trial, as follows. At the pre-trial hearing on the date the trial began, August 16, 1993, the prosecutor advised the trial court that "We need to interlineate the indictment. The Court of Criminal Appeals

has ordered us to, Judge." (Pre-Trial Hearing & Voir Dire, 20). At the time of the proffered interlineation, the indictment still said "inducted" as opposed to "induced". (Pre-Trial Hearing & Voir Dire, 22). Citing *Ward v. State, supra,* trial counsel for Petitioners objected to the physical altering of the indictment stating:

> "[Mr. Anderson]: The change from 'inducted' to 'induced' constitutes a substantial detriment to the Defendants because, as the indictment is sitting right now, it does not charge a violation of the state law. If the Court allows them to change 'inducted' to 'induced,' it then constitutes an offense.(Pre-Trial Hearing & Voir Dire, 23)
>
> . . . .
>
> MR. SAWYER: The problem is that Ward sets out a three-step process and the burden is on the State of Texas. The burden is to introduce a motion, get a ruling that is favorable and then secure the interlineation. What the State wants to do today on the day of trial is say hey, we didn't meet the obligation and we didn't do it.
>
> The Defense is under no obligation to go over and say to the State of Texas hey, you haven't done your work. . . . (Pre-Trial Hearing & Voir Dire, 24)
>
> Now, I will say on the record for Defendant Newsom yes, I know they haven't carried out the third step [interlineation] and that is the same burden that they have before or during trial. They didn't get it done. The changes today means that turns what is clearly not cognizable under the Penal Code into an offense. We

relied on it. It may be to the detriment of the State of Texas, but Ward speaks straight to it. They have never interlineated.

We object because we would be substantially harmed on the date of trial in that the State of Texas would have, against statute, been allowed to interlineate so as to substantially impair our ability to go forward. And it is the State's burden, Your Honor. They just didn't meet it. (Pre-Trial Hearing & Voir Dire, 25).

. . . .

[Mr. Sawyer]: We continue to object under 28.10 and the applicable provision of the Texas State Constitution to an amendment that results in the loss of substantial right running to Mr. Newsom in that the Defendant Newsom believes that prior to today's interlineation, Paragraph 1 did not state an offense cognizable under the Texas Penal Code.

However, being respectful to the Court's order, the Defendants will not request a continuance.

. . . .

[Mr. Anderson]: Yes, Judge, could the record reflect that this is August the 16th at 10:30, the date this case was previously set for trial and the date the interlineation is going to occur and that Defendant Wolf joins in all the objections voiced earlier by Mr. Sawyer and would add that the applicable provision of the Texas Constitution are [sic] Article 1, Section 10. He is being denied substantial rights under that.

Defendant Wolf also believes that the charging instrument has failed to state an offense until the interlineation takes place. That it is a substantial depravation [sic] of his rights to allow this amendment on the date of trial and the Defendant persists in his objections under 28.10 and Article 1, Section 10 of the Texas Constitution.

> And Defendant Wolf declines at this time to ask for a continuance and would point out to the Court that this is an engaging in organized criminal activity indictment and it has alleged three manner and means in the offense taking place and that the other two manner in [sic] means are in tact as they were indicted, even if the interlineation was allowed. (Pre-Trial Hearing & Voir Dire, 29-30).

The harm in permitting a day of trial amendment is evident in the fact that Petitioner's counsel were relying on the failure of the State to properly amend so as to charge an offense against Petitioners in their preparation for defense of the Petitioners. The law clearly prohibited such amendments and the Petitioners were within their rights to base their defense on the fact that the State, under the unamended indictment, could never establish an offense against the laws of the State of Texas. Such reliance on the law of this State at the time of trial, and the trial court's allowance of the amendment to charge a crime, was harmful to Petitioners since it permitted the State to obtain a conviction on the basis of a theory not initially pled.

The standard for judging whether an accused receives the Effective Assistance of Counsel in the class of cases that present claims of "actual ineffectiveness" is governed by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Petitioners contend that the decision of the Court of Appeals amounts to government constrained and imposed ineffectiveness of Petitioner's counsel under the Sixth Amendment to the United States Constitution. Petitioners' counsel were the only participants at the trial of this case that attempted to follow the long-established law of this state with reference to amending the indictment and they relied upon such law in vigorously defending their clients. The prosecutors urged the trial judge to disregard established law. Petitioners' attorneys cited the law of the State of Texas at the time and urged the trial judge to follow that established law. The trial judge declined to follow the law. On appeal, the Court of Appeals made new law, contrary to established, published opinions constituting the law of the State of Texas and refused to publish its decision. This refusal to publish the

opinion creates a one-case exception to the established law applicable only to these Appellant. The law in Texas did not change; it merely was not applied to these Appellant.

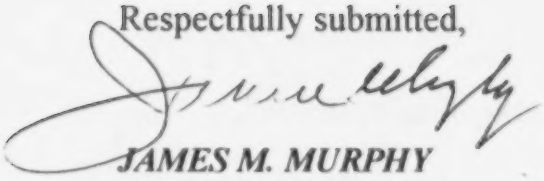
Petitioners were deprived the effective assistance of counsel by reason of the change in the well-established law of Texas, applicable only to these Appellant, and sanctioned by the Court of Criminal Appeals in its refusal to correct this error of law.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. Petitioners pray that the Petition for Writ of Certiorari be granted and that upon full consideration the Court reverse the decision of the Texas Court of Appeals, Third Supreme Judicial District at Austin, with instructions that Petitioners be granted a new trial.

December 11, 1995.

Respectfully submitted,



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Counsel for Petitioners

NO._____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1995

GARY NEWSOM
and
JEROME WOLF,
Petitioners,

vs.

THE STATE OF TEXAS,
Respondent.

APPENDIX

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE COURT OF APPEALS OF TEXAS
THIRD SUPREME JUDICIAL DISTRICT
AT AUSTIN, TEXAS

Counsel for Petitioners:

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December 11, 1995

IN THE COURT OF APPEALS, THIRD DISTRICT OF TEXAS AT AUSTIN

JUDGMENT RENDERED MAY 17, 1995

NO. 03-93-00675-CR

JEROME WOLFE V. THE STATE OF TEXAS
APPEAL FROM 167TH DISTRICT COURT OF TRAVIS COUNTY

BEFORE CHIEF JUSTICE CARROLL, AND ABOUSSIE AND DAVIS
AFFIRMED - OPINION BY JUSTICE DAVIS

THIS CAUSE came on to be heard on the transcript of the record of the court below, and the same being considered, because it is the opinion of this Court that there was no error in the judgment: IT IS ORDERED, ADJUDGED and DECREED by the Court that the judgment be in all things affirmed; that the appellant pay all costs relating to this appeal; and that this decision be certified below for observance.

IN THE COURT OF APPEALS, THIRD DISTRICT OF TEXAS AT AUSTIN

JUDGMENT RENDERED MAY 17, 1995

NO. 03-93-00678-CR

GARY NEWSOME V. THE STATE OF TEXAS
APPEAL FROM 167TH DISTRICT COURT OF
TRAVIS COUNTY

BEFORE CHIEF JUSTICE CARROLL, AND ABOUSSIE AND DAVIS
AFFIRMED - OPINION BY JUSTICE DAVIS

THIS CAUSE came on to be heard on the transcript of the record of the court below, and the same being considered, because it is the opinion of this Court that there was no error in the judgment: IT IS ORDERED, ADJUDGED and DECREED by the Court that the judgment be in all things affirmed; that the appellant pay all costs relating to this appeal; and that this decision be certified below for observance.

TEXAS COURT OF APPEALS, THIRD DISTRICT AT AUSTIN

NO. 03-93-00675-CR

Jerome Wolf, Appellant
v.
The State of Texas, Appellee

AND

NO. 03-93-00678-CR

Gary Newsome[1], Appellant
v.
The State of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 167TH JUDICIAL DISTRICT NO. 0932962, HONORABLE LARRY FULLER, JUDGE PRESIDING

After finding appellants Wolf and Newsome guilty of engaging in organized criminal activity, Tex. Penal Code Ann. Sec. 71.02 (West 1994), the jury assessed Wolf's punishment

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[1] [Appellant's Note: Gary Newsom's name is misspelled throughout this opinion. The opinion is reproduced with such misspellings.]

at confinement for ten years and a fine of ten thousand dollars, and Newsome's punishment at confinement for five years. Appellants assert nine points of error, contending the trial court erred by: (1) granting the State's motion to amend the indictments the day of trial; (2) granting the State's motion to amend the indictments to change the manner and means of the offense; (3) finding no fatal variance between the indictments and the proof; (4) finding the evidence sufficient to show ownership of the property; (5) finding the evidence sufficient to support the conviction; (6) admitting State's Exhibits 1 through 98 over timely objections by appellants; (7) admitting State's Exhibits 99 through 113 over appellants' timely objections; (8) denying Wolf's motion for mistrial after the prosecutor commented on his failure to testify; and (9) finding the evidence sufficient to show the value of the property. We will overrule appellants' points of error and affirm the judgments of the trial court.

Appellants were convicted under the first count in the indictments providing in pertinent part that appellants:

> with intent to establish and maintain and participate in a combination and in the profits of a combination consisting of [appellants], Pat Fry, [and] David Williams, did commit the following offenses pursuant to a continuing course of conduct:
>
> On or about the 8th day of March, 1990, in the County of Travis and State of Texas, Pat Fry and David Williams and defendants Gary Newsome and Jerome Wolf did then and there unlawfully appropriate property, by acquiring and otherwise exercising control over property, namely, workers' compensation insurance, of the value of over $20,000.00 and with the intent to deprive the owner of the property and without the effective consent of the owner, the Texas Workers Compensation Assigned Risk Pool, said consent being induced by deception, namely, said defendants created and confirmed by words and conduct, a false impression of fact, not believing it to be true, that was likely to affect and did affect the judgment of said owner in the transaction.

Appellants operated Metro Financial Group, Inc., d/b/a ATS, Inc. ("ATS") in Oklahoma City. ATS was engaged in "employee leasing," a concept in which businesses terminate their employees, who are then hired by a leasing company. The leasing company then leases the services of the employees to their original employers for a service fee. The

original employer pays salaries, insurance, and benefits in addition to the service fee. The arrangement results in savings for the original employer in workers' compensation insurance and other insurance costs incidental to employee coverage.

Anyone seeking workers' compensation insurance coverage in Texas who is unable to secure it in the voluntary market may apply through the Texas Workers' Compensation Assigned Risk Pool (the "Pool"). If the Pool decides to bind the risk, the Pool assigns the risk to one of the servicing companies. Upon request from the insured, the servicing company issues certificates of insurance. It is the servicing company's responsibility under its contract with the Pool to issue the policy, to collect the premiums and to handle and pay claims. The amount of premium is based on the payroll. The insured is obligated to send payroll reports to the servicing company. Pursuant to its contract with the Pool, the servicing company sends auditors to review the payroll records of the insured at the end of the policy period.

The Pool must write workers' compensation insurance for companies that are unable to secure it through the voluntary market. The Pool is ultimately responsible for paying claims and absorbing losses. If the Pool suffers a net underwriting loss in a year, it assesses all member companies based on a pro rata basis of their market share. Losses that are paid by a servicing company are reimbursed by the Pool.

At the outset, we will consider appellants' points of error challenging the sufficiency of the evidence to support the convictions. In their fifth point of error, appellants contend that there is an absence of evidence to show that appellants intended to unlawfully appropriate the property at the time of taking thereof.

When reviewing a challenge to the sufficiency of the evidence to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the conviction, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19

(1979); *Butler v. State*, 769 S.W.2d 234, 239 (Tex. Crim. App. 1989). A reviewing court should not substitute its determination of guilt for that of the fact finder unless it is found to be irrational or unsupported by the evidence, such evidence being viewed under the standard set forth in Jackson. *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). "[I]t is enough that the conclusion of guilt is warranted by the combined and cumulative force of all the incriminating circumstances." *Brandley v. State*, 691 S.W.2d 699, 703 (Tex. Crim. App. 1985).

ATS, an employee leasing company with headquarters in Oklahoma City and doing business in Texas, submitted an application to the Pool on January 31, 1989, requesting workers' compensation insurance. At that time, Newsome was president of ATS, and Wolf was chief financial officer and CPA of ATS. The application to the Pool was signed by Patricia Fry as vice-president of ATS.

Fry testified that a number of representations in the application were incorrect. Fry, a sales representative for

ATS, stated that she did not know that she was ever a vice-president of ATS. The application listed the location of all "factories, shops, yards, buildings, premises or other work places" of ATS as an address in Colleyville, Texas, an address Fry stated was her personal residence. The statements in the application about the business buildings and workplaces being located at the Colleyville address were false, ATS having headquarters in Oklahoma City. Fry testified that Newsome called her and asked that she sign the application, stating "I was there and he wasn't. It was just a matter of convenience." Pursuant to the applicant's expressed preference, the Pool assigned Houston General Insurance Company as servicing carrier, effective February 1, 1989.

David Williams, a sales person for ATS, testified he probably sold leasing agreements in Texas in 1989, John Barbour Trucking being his first account. Williams sent requests from the Oklahoma City office to Houston General for certificates of insurance for its leasing clients. After Houston General refused to provide the certificates because

the request did not come from an executive officer, Newsome advised Houston General in a letter, dated August 28, 1989, that Williams was an executive vice-president of ATS. Williams denied ever being an executive vice-president of ATS. Williams requested numerous certificates of insurance, which Houston General issued. Williams explained that certificates of insurance show that employees are covered and that the amount of payroll of ATS's client companies is a factor in determining the premium.

The Pool directed ATS to report its payroll on a monthly basis. Madge Wenzell, medical claims adjuster for Houston General, identified letters she sent ATS in April, July, and September 1989, asking for payroll information and threatening to cancel the policy if the information was not received. Wenzell received a letter, dated July 1, 1989, from Wolf stating, "[W]e are still attempting to book some business in the State of Texas -- however to date we have no payrolls to be covered by the subject policy." Leasing agreements with Texas companies, beginning in January

1989, were shown to have been executed by ATS prior to the date of Wolf's letter. Houston General received payroll reports signed by Wolf for the months of July through December 1989, which showed no employees and no payroll.

Representatives of Barbour Trucking Company, Thrasher Trucking Company, Big Mack Trucking Company, Patterson Drilling Company, Chem-Pac, Snyder Well Servicing, Patterson Petroleum, Bource Services, B.W. Fabricators and Questor Drilling testified that they had contracted with ATS for employee leasing services, all agreements signed on behalf of ATS by either Newsome or Wolf. Jerry Gill and Michelle Gill testified that they worked under the supervision of Wolf at ATS in 1989. They stated that they received payroll reports from the above named companies and entered the reports in the ATS computers.

Kim Broom, senior payroll analyst for Houston General, testified that she became concerned and called Kay Hamblin at the Pool to report that ATS had an "extremely active file for certificate holders as well as alternate employer

endorsements and the insurer had reported no payroll for any employees for any reason." John Guy testified that he was in charge of insurance, accounting and financial operations for Questor Drilling in 1989. Guy signed a lease agreement on behalf of Questor with ATS, represented by Wolf, on December 10, 1989. Guy notified the Pool to report that Questor's employees were covered by Houston General, effective December 16, 1989. Questor paid ATS to cover its payroll, insurance and other costs under the contract. Guy became concerned after learning that the company's December payroll had not been reported by ATS. After Guy called Wolf about the failure of ATS to file a report, Wolf filed an amended report for December that only listed the payroll of Questor Drilling. A letter accompanied the report stating that he (Wolf) was unaware that a salesman had sold some business. The amount of premium based on the payroll report was $33,069.

Kelly Crowell, an employee of a firm doing insurance premium auditing, was contacted by Houston General to

audit ATS to determine whether they had correctly reported their payroll throughout the policy period. After being contacted, Wolf told Crowell that he needed two weeks, and Crowell agreed to this request. At the expiration of two weeks, Crowell attempted to contact Wolf to no avail. Despite personally going to Wolf's office in Oklahoma City on March 8, 1990, Crowell testified that he was never able to see or make further contact with Wolf. Crowell stated that he abandoned his efforts to conduct the audit because of ATS's failure to cooperate.

Alton Head, manager of the premium audit department at Houston General, testified that he was "finally" able to talk to Wolf on April 25, 1990, at which time Wolf stated that he would agree to an audit after a hearing on a temporary restraining order on May 7. Wolf advised Head that he would call him. Head related that Wolf never called him. Head advised the Pool that Houston General was unable to audit ATS because of ATS's refusal to make records available. Gina Hawkins, a Pool employee, testified that the

Pool would not insure an applicant if the Pool knew that the applicant was not going to submit payroll reports, fail to pay premiums and refuse to submit to an audit.

Appellants point to the indictments that allege that the offense occurred "on or about March 8, 1990," and note that their application was filed on February 2, 1989. Appellants contend that there is a total absence of evidence that appellants intended to unlawfully appropriate property at the alleged date. Where an "on or about" date is alleged as the date of the commission of the offense, a conviction may be had upon proof that the offense was committed any time prior to the return of that indictment that is within the limitation period. *Ex Parte Hyett*, 610 S.W.2d 787, 789 (Tex. Crim. App. 1981). The limitations period for engaging in organized crime is the same as that of the most serious offense that is the object of the activity. Tex. Code Crim. Proc. Ann. art. 12.03(b) (West Supp. 1995). The most serious offense in the present case is theft, and the limitation period for theft is five years. Tex. Code Crim. Proc. ann. art. 12.01 (West Supp.

1985). The State thus clearly proved that the alleged offense occurred within the limitation period.

Appellants rely on cases holding that a failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the accused did not intend to perform or knew that the promise would not be performed. *See Peterson v. State*, 645 S.W.2d 807, 811 (Tex. Crim. App. 1983); *Phillips v. State*, 640 S.W.2d 293, 294 (Tex. Crim. App. 1982); *Stockman v. State*, 826 S.W.2d 627, 636 (Tex. App.-Dallas 1992, pet. ref'd); *Cox v. State*, 658 S.W.2d 668, 670-71 (Tex. App.-Dallas 1983, pet. re'fd). A common thread in these cases was the State's reliance on the accuseds' failure to fully complete construction pursuant to the terms of the contracts. *Peterson, Stockman, Phillips and Cox* held that a showing that the accused had not fully performed his obligation under the contractual agreement, standing alone, was insufficient to show that payments were obtained by deception.

In the instant cause, appellants' initial application to the Pool was fraught with misrepresentations. The applications for certificates of insurance were made by a person who was falsely represented to be an executive officer of the Pool. Payroll reports were listed as zero after lease agreements had been made with companies who had reported payrolls and made premium payments. Houston General found it impossible to obtain appellants' cooperation for an audit. Thus, the deception that began with the initial application to the Pool continued throughout the entire series of transactions. Viewing the evidence in the light most favorable to the verdicts, we hold that a rational trier of fact could have found that there was sufficient evidence of intent to support the verdict. Appellants' fifth point of error is overruled.

In their fourth point of error, appellants assert that the evidence is insufficient to show that the Pool was the owner of the property appropriated. "Owner" is defined as a person who "has title to the property, possession of the property,

whether lawful or not, or a greater right to possession of the property than the actor." Tex. Penal Code Ann. Sec. 1.07(a)(35)(A) (West 1994). The trial court tracked this definition of "owner" in its charge to the jury. Appellants urge that the Pool never services any policy, never writes any policy, and never pays any claims. While the Pool may obtain a copy of the policy for its files, appellants urge that it has no legal title to the policy.

At the outset, it should be noted that appellants were charged with the theft of workers' compensation insurance rather than an insurance policy. It is undisputed that the only way appellants could obtain workers' compensation insurance was by making application to the Pool. The Pool underwrites the application, binds insurance coverage and assign a servicing company. The servicing company issues the policy, collects premiums, provides loss control services, pays claims and performs audits. While it is ultimately reimbursed by member companies, the Pool has the responsibility for paying claims and absorbing losses. At the very least, the Pool stands

in an agency or broker relationship with the servicing companies. The duties performed by the Pool in accepting applications, binding coverage, assigning it to a servicing company and paying losses provide probative evidence that the Pool exercises a degree of management and control over the insurance. Viewing the evidence in the light most favorable to the verdict, we hold that a rational trier of fact could have found that there was sufficient evidence to support a finding that the Pool had a greater right of possession to the insurance than persons who obtained it by deception. Appellants' fourth point of error is overruled.

In their ninth point of error, appellants assert that the evidence is insufficient to show the value of the property. The indictments charged that appellants "did then and there unlawfully appropriate property, by acquiring and otherwise exercising control over property, namely workers' compensation insurance, of the value of over $20,000 . - - -" Appellants urge that the contract or policy was never

introduced at trial and that there was never an audit performance on the contract of insurance.

Appellants were charged with the theft of insurance. We are persuaded that insurance is "intangible personal property" capable of being stolen. See Tex. Penal Code Ann. Sec. 31.01(5)(B) (West 1994). The trial court held that Pool employee Gina Hawkins was an expert witness in calculating premiums from payroll and worker classification. Hawkins used invoices ATS had sent to companies with which it had leasing agreements to determine worker classification and payroll in calculating the premiums. Hawkins testified that the total premiums due for payrolls of the seven client companies was $215,452. Guy of Questor Drilling testified that the premium due for his company in January 1990 would have been in excess of $30,000. ATS did not report any payroll or employees for the month of January 1990. We find no merit in appellants' argument that the date the insurance was appropriated was not shown. Clearly, the appropriation was within the limitation period. We hold that a rational trier of

fact could have found beyond a reasonable doubt that there was sufficient evidence to support the value element of the offense. Appellants' ninth point of error is overruled.

In their first point of error, appellants contend that the trial court erred in granting the State's motion to amend the indictments where they alleged that consent was "inducted" by deception by replacing the word "inducted" with the word "induced." The trial court granted the State's motion to amend at a pretrial hearing on July 6, 1993. The physical act of deleting the letter "t" to change the word "inducted" to the word "induced" did not occur until August 16, 1993 at a pretrial hearing on the first day of trial. The trial court overruled appellants' objection to the trial court's permitting the physical act of amending the indictment on the first day of the trial. The trial court offered appellants a continuance, which appellants declined. Article 28.10 of the Code of Criminal Procedure provides:

> (a) After notice to the defendant, a matter of form or substance in an indictment or information may be amended at any time

> before the date the trial on the merits commences. On the request of the defendant, the court shall allow the defendant not less than 10 days, or a shorter period if requested by the defendant, to respond to the amended indictment or information.
>
> (b) A matter of form or substance in an indictment or information may also be amended after the trial on the merits commences if the defendant does not object.
>
> (c) An indictment or information may not be amended over the defendant's objection as to form or substance if the amended indictment or information charges the defendant with an additional or different offense or if the substantial rights of the defendant are prejudiced.

Tex. Code Crim. Proc. Ann. art. 28.10 (West 1989).

In *Ward v. State*, 829 S.W.2d 787 (Tex. Crim. App. 1992), cited by appellants, the court held that notice of an amendment must come from the face of the indictment, not a trial court order authorizing the amendment. *Id.* at 794. In *Sodipo v. State*, 815 S.W.2d 551 (Tex. Crim. App. 1991), relied on by appellants, the State sought to amend the indictment on the first day of trial by changing an enhancement paragraph cause number and the defendant's

objection and request for a ten-day continuance were overruled by the trial court. The court held that the harmless error analysis under Texas Rules of Appellate Procedure 81 (b)(2) should not be applied to the ten day continuance rule. *Id.* at 556.

Unlike *Sodipo*, the trial court in the instant cause offered appellants a ten-day continuance to respond to the amended indictment. In *Ward*, unlike the instant cause, the State did not physically amend the indictment despite the trial court's order authorizing the State to amend the name of the complaining witness from "Steve Holler" to "Steve Scott." The *Sodipo* court specifically noted that it was not deciding that all "mandatory" statutes are immune for the harmless error analysis, stating:

> We do find that provisions such as the ten day requirement found in Art. 28.10(a) cannot be subjected to a harm analysis in any meaningful manner, because the record will not reveal any concrete data from which an appellate court can meaningfully gauge or quantify the effect of the error.

Id. at 554.

Assuming that the trial court erred by overruling appellants' objection, the instant cause contains data from which we can "meaningfully gauge or quantify the effect of the error." While the order allowing the amendment, granted well in advance of trial, did not serve as the physical amendment, the trial court could have reasonably inferred that appellants were not surprised or unprepared to respond to the amended indictments when they declined the trial court's offer of a continuance. We hold beyond a reasonable doubt that any error the trial court made in allowing the amendment made no contribution to the conviction or the punishment. Appellants' first point of error is overruled.

In their second point of error, appellants urge that the trial court's action in granting the State's motion to amend the indictments prejudiced appellants' substantial rights. We find our disposition of appellants' first point of error dispositive of this contention. Appellants' second point of error is overruled.

In their third point of error, appellants assert that there is a fatal variance between the indictments and the proof at trial because there is no evidence that appellants "inducted" consent by deception. The indictments in the instant cause were amended by deleting the letter "t" in order to reflect the word "induced." Thus, the State was under no burden to prove that consent was "inducted" by deception. Moreover, the Court of Criminal Appeals has recently stated that not every variance between the evidence at trial and the indictment is fatal. *Stevens v. State*, 891 S.W.2d 649, 650 (Tex. Crim. App. 1995). The court cited earlier cases that had held that the defendant had the burden to show that he was surprised or prejudiced. *See Human v. State*, 749 S.W.2d 832 (Tex. Crim. App. 1988); *Plessinger v. State*, 536 S.W.2d 380 (Tex. Crim. App. 1976). We find no merit in appellants' contention that the holding in *Stevens* is prospective. Assuming there had been a variance in the instant cause, the appellants have not shown surprise or prejudice. Appellants' third ground of error is overruled.

In their sixth and seventh points of error, appellants urge that the trial court erred in admitting State's Exhibits 1 through 98 and Exhibits 99 through 113 as business records of Houston General Insurance Company. Appellants contend that the records were inadmissible because: (1) the business records affidavits and the required notice are faulty; (2) the records were prepared in anticipation of litigation; (3) appellants were not afforded the right of confrontation under the United States Constitution and the Texas Constitution; and (4) the records contain hearsay within hearsay and lack trustworthiness.

The affidavits, signed by Norma Normad and Robert Gripp as custodians of the business records of Houston General Insurance Company, track the affidavit form set out in Rule 902(10)(b) of the Rules of Criminal Evidence. Tex. R. Crim. Evid. 902(10(b). The affidavits omit the number of pages contained in the records. Both affiants testified at trial. Rule 902(10)(b) provides that "an affidavit that substantially complies with the provisions of this rule shall suffice." Id. In

Petrick v. State, 832 S.W.2d 767 (Tex. App.-Houston [1st Dist.] 1992, pet. ref'd), the court rejected the defendant's claim that there had not been substantial compliance where there was a discrepancy in the number of documents and pages listed. *Id.* at 772-73. The affidavits refer to the "records attached hereto." We hold that the trial court in the instant cause did not abuse its discretion in finding substantial compliance with Rule 902.

Appellants urge that they were not given proper notice of the filing of the affidavits and the business records because the notice did not identify the name and employer to which the affidavits applied. Rule 902(10)(a) provides that the "notice shall identify the name and the employer, if any, of the person making the affidavit." Tex. R. Crim. Evid. 902(10)(a). The affiants in the instant cause were identified as "custodians of business records for Houston General Insurance Company." We perceive no error where as in the instant cause the word "employer" is omitted, when the clear

import of the language used leaves no doubt about the identity of the affiants' employer.

Appellants claim the business records were prepared in anticipation of litigation. Appellants' contention is not supported by a condensed statement of facts showing how the records in the instant cause were prepared in anticipation of litigation nor do appellants cite pages in the record where the matter complained of is to be found, as required by Rule 74 of the Texas Rules of Appellate Procedure. See Tex. R. App. P. 74(d), (f); *Petrick*, 832 S.W.2d at 773. Appellants generally allege that the records were prepared in anticipation of litigation without discussing how the authorities they cite apply to the instant cause. Thus, they have not properly presented this argument for review.

Appellants' contention that they were denied the right to confrontation and cross-examination under the United States Constitution and Texas Constitution is generally alleged without any reference to any place in the record where these objections were voiced in the trial court. See Tex

R. App. P. 74(d). Applicable to this contention, as well as appellants' claim that the records lack an indicia of reliability, is Rule 803(6) of the Rules of Criminal Evidence which provides that records that comply with Rule 902(10) are admissible without regard to the availability of the declarant "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Tex. R. Crim. Evid. 803(b). Appellants have failed to show how the business records in question lack trustworthiness. Appellants' sixth and seventh points of error are overruled.

In the eighth point of error, appellant Wolf asserts that the trial court erred in overruling his motion for mistrial after the prosecutor commented on his failure to testify. As we will show, appellant Newsome expressly disassociated himself from the motion. the following occurred during the State's closing argument at the guilt/innocence phase of the trial:

MS. KEY [Prosecutor]: Moreover, ladies and gentlemen, Jerome Wolf continues on his scam getting free workers' compensation insurance and he gets caught. And he gets caught when John Guy finds out, as you remember his testimony, when John Guy says hey, boys, I had insurance with Houston General and I found out from Ms. Kay Hamblin that my premium has not been paid for the month of December.

You have that letter from Mr. Guy in evidence before you. The letter he wrote to the Pool saying hey, I'm covered by Houston General under this policy number. So he calls as he testified. He calls up to Oklahoma City and he says hey, where is my premium report. I want my men covered. And Jerome Wolf says oh, I forgot. He files an amended payroll report, ladies and gentlemen..... He says to Questor Drilling okay, I'll file it. Because John Guy is breathing down their neck, he files a December report saying oh, yeah we owed you $33,000 and he attaches a letter saying oh, I'm sorry; when I filed the December 1989 report saying I had no payroll therefore no premium, I didn't know we had any business. Houston General received this in January of '90.

Well ladies and gentlemen, guess who signed the Questor Drilling lease agreement in December of 1989. Jerome Wolf. Jerome Wolf knew that he had business. He's lying through his lawyer. It is not true.

MR. SAWYER [Counsel for Newsome]: That is it. That is a comment on the failure of the

> Defendant to testify. She knows it, it is back door; I object.
>
> THE COURT: I sustain the objection. The Court instructs you not to concern yourself and disregard the last regard [sic].
>
> MR. ANDERSON [counsel for Wolf]: Judge, wait I am not done. On behalf of Defendant Jerome Wolf I move for a mistrial because of her comment on the failure of the Defendant to testify.
>
> MR. SAWYER: On behalf of Defendant Newsom we will not move for a mistrial under any circumstances.
>
> THE COURT: Overruled, Mr. Anderson.

The failure of a defendant to testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause. Tex. Code Crim. Proc. Ann. art. 38.08 (West 1979). The standard to be used in determining whether prosecutorial comment violates Article 38.08 is set forth in *Dickinson v. State*, 685 S.W.2d 320 (Tex. Crim. App. 1984):

> It is now well settled in this State that for the argument or comment of the prosecuting attorney to offend against Art. 38.08, supra,

> the language used must be looked to from the standpoint of the jury, and the implication that the language used had reference to the accused's failure to testify must be a necessary one. It is not sufficient that the language used might be construed as an implied or indirect allusion thereto. The test employed is whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be comment on the accused's failure to testify. Of course, in applying this test, the facts and circumstances of each case must be analyzed to determine whether the language used was of such character.

Id. at 323 (citations omitted).

The argument that Wolf lied in his letter to Houston General by stating "I didn't know we had any business" was a reasonable deduction from the evidence that showed that Wolf had earlier signed a lease agreement with Questor Drilling. Under these circumstances, the language was not of such character that the jury would naturally and necessarily take it to be a comment on appellant's failure to testify. Moreover, prior to the complained of argument, the prosecutor had argued, without objection, that appellant had lied when he wrote Houston General a letter on July 1, 1989

that he would advise them when they signed up anyone "because on May 20, 1989, Jerome Wolf signed a leasing agreement with Thrasher Trucking." To be timely, an objection must be raised at the earliest opportunity. *See Johnson v. State*, 803 S.W.2d 272, 291 Tex. Crim. App. 1990), *cert. denied*, 111 S. Ct. 2914 (1991).

While no objection was raised in the trial court that the prosecutor was striking at appellant over his counsel's shoulders, an argument that accuses defense counsel of improper argument cannot be condoned. *See Gomez v. State*, 704 S.W.2d 770, 772-73 (Tex. Crim. App. 1985). Since defense counsel did not voice this objection at trial, reversal will result on appeal only if the comment was so prejudicial that an instruction to disregard could not have cured the harm. *Wilkerson v. State*, 881 S.W.2d 321, 328 (Tex. Crim. App. 1994). Defense counsel had earlier stated that the prosecution and the insurance industry were "allies" and that "the State would rather lose count two than even remotely touch the truth of the matter." The protection afforded

defense counsel against charges of improper conduct "does not create a sanctuary to which defense counsel may retreat with immunity and thereby deny the prosecutor the right to reply to defense counsel's argument." *Fegurgur v. State*, 734 S.W.2d 103, 106 (Tex. App.-Austin 1987, no pet.). Assuming that the prosecutor's argument can be construed as striking over his counsel's shoulders, we hold that de trial court's instruction to disregard cured any improper argument. Appellant Wolf's eighth point of error is overruled.

The judgments are affirmed.

Tom G. Davis, Justice

Before Chief Justice Carroll, Justices Aboussie and Davis*
Affirmed on Both Causes
Filed: May 17, 1995
Do Not Publish

* Before Tom G. Davis, Judge (retired), Court of Criminal Appeals, sitting by assignment.
See Tex. Gov't Code Ann. Sec. 74.003(b) (West 1988).

OFFICIAL NOTICE [POSTCARD]

COURT OF CRIMINAL APPEALS

September 13, 1995

RE: Case No. 0721-95

RE: Case No. 0722-95

STYLE: WOLF, JEROME

STYLE: NEWSOM, GARY

The Petitioners' and State's Petitions for Discretionary Review were refused.